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Federal Communications Commission

DA 01-2955

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Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)
)
Request for Review of the)
Decision of the)
Universal Service Administrator by)
)
Buffalo and Erie County Public Library)
Buffalo, New York)
)
Federal-State Joint Board on)
Universal Service)
)
Changes to the Board of Directors of the)
National Exchange Carrier Association, Inc.)

File No. SLD-168883

CC Docket No. 96-45✓

CC Docket No. 97-21

ORDER

Adopted: December 19, 2001

Released: December 20, 2001

By the Accounting Policy Division, Common Carrier Bureau:

1. Before the Accounting Policy Division (Division) is a Request for Review filed by Buffalo and Erie County Public Library (BECPL), Buffalo, New York, appealing a decision issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator).¹ BECPL seeks review of SLD's denial of one of its Funding Year 3 requests for discounts under the schools and libraries universal service mechanism.² For the reasons discussed below, we deny the Request for Review and affirm SLD's decision.

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections.³ The Commission's rules require that the applicant make a bona fide request for services by filing with the Administrator an FCC Form 470, which is posted to the Administrator's website for all

¹ Request for Review of the Decision of the Universal Service Administrator by Buffalo and Erie County Public Library, CC Dockets No. 96-45 and 97-21, Request for Review, filed March 27, 2001 (Request for Review).

² Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

³ 47 C.F.R. §§ 54.502, 54.503.

potential competing service providers to review.⁴ After the FCC Form 470 is posted, the applicant must wait at least 28 days before entering an agreement for services and submitting an FCC Form 471, which requests support for eligible services.⁵ SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules.

3. In the *Fifth Reconsideration Order*, the Commission established rules to govern how discounts would be allocated when total demand exceeds the amount of funds available and a filing window is in effect.⁶ These rules provide that requests for telecommunications and Internet access service for all discount categories shall receive first priority for available funds (Priority One services), and requests for internal connections shall receive second priority (Priority Two services).⁷ Thus, when total demand exceeds the total support available, SLD is directed to give first priority for available funding to telecommunications service and Internet access.⁸ Any funding remaining is allocated to requests for support for internal connections, beginning with the most economically disadvantaged schools and libraries, as determined by the schools and libraries discount matrix.⁹ Schools and libraries eligible for a 90 percent discount would receive first priority for the remaining funds, which would be applied to their request for internal connections. To the extent that funds remain, the Administrator would continue to allocate funds for discounts to eligible applicants at each descending single discount percentage, e.g., eighty-nine percent, eighty-eight percent, and so on until there are no funds remaining.¹⁰ In Funding Year 3, funding of discounted internal connections was available only for schools with discount rates of 82% or higher.¹¹

⁴ Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470); 47 C.F.R. § 54.504(b); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9078, para. 575 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed*, *GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000).

⁵ 47 C.F.R. §§ 54.504(b), 54.504(c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 471).

⁶ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, 13 FCC Rcd 14915 (1998) (*Fifth Order on Reconsideration*).

⁷ 47 C.F.R. §§ 54.502, 54.503.

⁸ The annual cap on federal universal service support for schools and libraries is \$2.25 billion per funding year. See 47 C.F.R. § 54.507(a).

⁹ *Fifth Order on Reconsideration*, 13 FCC Rcd at 14938, para. 36.

¹⁰ 47 C.F.R. § 54.507(g)(1)(iii).

¹¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rule Making and Order, FCC 01-143, n.13 (rel. April 30, 2001) (*Further Notice of Proposed Rulemaking*).

4. In Funding Year 3, in an effort to ensure that the priority rules were not violated, SLD implemented a review procedure of reclassifying a request that the applicant designated telecommunications or Internet access (Priority One) as one seeking Priority Two services if any portion of the services requested were found to be Priority Two.¹² Absent such a procedure, SLD would be unable to act on funding requests that mixed Priority One and Priority Two services until Priority Two availability could be determined with certainty. This, in turn, would create a substantial backlog of application reviews late in the Funding Year 3 application review period, potentially causing funding delays injurious to applicants.¹³ The Common Carrier Bureau has previously found this SLD operating procedure for evaluating mixed priority requests to be a reasonable exercise of its authority.¹⁴ Accordingly, we continue to affirm the practice here.

5. At issue here is Funding Request Number (FRN) 366975 of BECPL's Funding Year 3 FCC Form 471.¹⁵ On the FCC Form 471, BECPL characterized FRN 366975 as Internet access.¹⁶ Documentation attached to the FCC Form 471 explained that FRN 366975 included \$23,462.04 for the lease of a T-1 line and 12 local loops, and \$10,289.04 for the purchase and maintenance of a Router and a "DSU/CSU" unit, for a total pre-discount cost of \$33,751.08.¹⁷

6. On May 5, 2000, SLD issued a Funding Commitment Decision Letter, which reclassified FRN 366975 to internal connections.¹⁸ Because BECPL was entitled to a discount

¹² See SLD Web Site, <http://www.sl.universalservice.org/reference/471_App_Guid_Docs/471_dozen.asp> (last updated April 15, 1999) ("To correctly apply the Rules of Priority (fund Telecommunications and Internet Access first, then Internal Connections beginning with neediest), SLD must 'scrub' telecommunications and Internet Access requests to assure no Internal Connections are included. A piece of equipment at the user's location listed in one of these categories risks having the entire service redefined as Internal Connections."); see also SLD Web Site, <<http://www.sl.universalservice.org/reference/ServCategories.asp>> (describing review procedure used in Funding Year 3 and new procedure applied in Funding Year 4).

¹³ See SLD Web Site, <<http://www.sl.universalservice.org/reference/ServCategories.asp>> ("While some applicants might prefer to wait until they know for sure whether funding will be sufficient to fund Internal Connections . . . SLD must process tens of thousands of applications and cannot leave these decisions until the end and still meet its goal of notifying applicants of the decisions on their requests before the start of the fund year.").

¹⁴ *Request for Review by Most Holy Trinity, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-161422, CC Dockets No. 96-45 and 97-21. Order, DA 01-2456 (Com. Car. Bur. rel. October 22, 2001). We note that, while the application of this procedure leads to a denial of funding in this instance, that result could have been avoided by submitting two separate funding requests, one for the Priority One services, and the second for the Priority Two services.

¹⁵ FCC Form 471, Buffalo and Erie County Public Library, filed January 18, 2000 (BECPL FCC Form 471).

¹⁶ *Id.* at 12.

¹⁷ *Id.*, Attachment 10. A DSU/CSU is a hardware device that can be rack-mounted, shelf-mounted or stood alone. It has three main functions: (1) to act as a demarcation point for a T1 (DS1) service from a local communications company; (2) to provide line format and line-conversion between the public network and the customer's equipment, if necessary; and (3) to provide maintenance or alarm services and loop-back for isolating problems with the T1 line or customer's equipment. McGraw-Hill Illustrated Telecom Dictionary, at 171-72 (3rd Ed. 2001).

¹⁸ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Shirley Whelan, Buffalo and Erie County Public Library, dated May 5, 2000 (Funding Commitment Decision Letter), at 8.

rate of only 60% on FRN 366975 based on the information it submitted with its FCC Form 471, SLD denied the request, stating that the “[f]unding cap will not provide for [i]nternal [c]onnections less than 81% discount to be funded.”¹⁹

7. BECPL appealed to SLD on June 2, 2000.²⁰ It asserted that FRN 366975 was properly characterized as Internet access because the equipment was being installed, operated and maintained by its Internet Service Provider (ISP) solely for the purpose of Internet access, and because the Internet service agreement with the ISP defined the equipment as “being on the ISP side of the demarcation.”²¹ BECPL argued that our decision in the *Indiana Intelenet Commission Order* supported its position.²² Finally, BECPL also requested that, if SLD continued to classify the Router and DSU/CSU unit as internal connections, SLD should fund the remaining portion of the request.²³

8. On February 27, 2001, SLD denied the appeal.²⁴ This decision stated that under program rules, equipment would be considered Priority One only if three criteria were satisfied: 1) The equipment is owned by or leased from the vendor with no provision for the future transfer of ownership to the applicant; 2) The equipment is used solely for the purpose of providing the underlying Priority One service; and 3) The equipment provides no Local Area Network functionality.²⁵ SLD found that because BECPL would own the equipment included in FRN 366975, the request did not meet the first criteria, and therefore had to be classified as internal connections.²⁶ SLD also found that funding could not be granted for this request, because BECPL’s discount rate was 60% and in Funding Year 3, “there [were] not sufficient funds to provide internal connections discounts to applicants below the 82% shared discount level.”²⁷

9. SLD also denied BECPL’s request to have the Priority One part of FRN 366975 segregated out. SLD stated that “[p]rogram rules do not provide for corrections to the Form 471

¹⁹ *Id.*; BECPL FCC Form 471, at 17. Later, SLD determined that it could not fund beyond the 82% discount level. See Administrator’s Decision on Appeal, at 2.

²⁰ Letter from Kenneth Stone, Buffalo and Erie County Public Library, to from Schools and Libraries Division, Universal Service Administrative Company, filed June 2, 2000 (Appeal to SLD).

²¹ *Id.* at 4-6.

²² *Id.* at 6-7 (citing *Request for Review by Indiana Intelenet Commission, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-42537, CC Dockets No. 96-45 and 97-21, Order, 15 FCC Rcd. 6934 (Com. Car. Bur. 1999) (*Indiana Intelenet Commission Order*)).

²³ *Id.* at 7-8.

²⁴ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Kenneth Stone, Buffalo and Erie County Public Library, dated February 27, 2001 (Administrator’s Decision on Appeal).

²⁵ *Id.* at 2.

²⁶ *Id.*

²⁷ *Id.*

once a commitment decision has been made unless there has been an error on the part of the SLD.²⁸ Accordingly, SLD affirmed its denial of the entire request.²⁹ BECPL then filed the pending Request for Review.

10. BECPL's Request for Review reiterates the arguments it presented to SLD. BECPL concedes that it would purchase the equipment at issue in FRN 366975, but asserts that FRN 366975 is Internet access because the equipment would be installed and maintained by BECPL's Internet Service Provider solely for the purpose of enabling BECPL to access the Internet.³⁰ BECPL further asserts that the equipment it seeks support for will provide no Local Area Network functionality.³¹ BECPL again cites to the *Indiana Intelenet Commission* decision as supporting its arguments.³² BECPL also argues that the manner in which the equipment is used and controlled should be the deciding factors in determining whether it is internal connections or Internet access, not whether the equipment is owned, rented or leased.³³

11. On review, we find that SLD correctly classified FRN 366975 as internal connections. In the *Tennessee Order*, the Commission held that when evaluating FRNs, SLD should determine if services nominally characterized by the applicant as Internet access or telecommunications (Priority 1) were actually internal connections (Priority 2) by looking for certain specified indicia of an internal connections service, including whether the equipment in question was owned by the vendor.³⁴ BECPL concedes that it would be the owner of the router and DSU/CSU at issue.³⁵ Thus, regardless of who operates or maintains the equipment, it constitutes internal connections, not Internet access under Commission rules.

12. The *Indiana Intelenet Commission Order* supports this conclusion. As BECPL observes in its Request for Review, the equipment at issue in that case was owned by the vendor, not the applicant, a factor that under the *Tennessee Order* indicated that the equipment was properly classified as Internet access, not internal connections.³⁶ In contrast, in the instant case,

²⁸ *Id.*

²⁹ *Id.* at 3.

³⁰ Request for Review at 5-7.

³¹ *Id.*

³² *Id.* at 7-8.

³³ *Id.* at 5.

³⁴ *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, para. 39 (1999) (*Tennessee Order*).

³⁵ Request for Review at 8.

³⁶ *Indiana Intelenet*, 15 FCC Rcd 6934, para. 6 (service provided was Internet access in part because "the routers at issue are owned and maintained by the Internet service provider, not Intelenet, or any public school or library.")

BECPL would own the equipment rather than the vendor, and is thus properly characterized as internal connections.

13. BECPL alternatively requests that, if we find that the equipment was properly classified as internal connections, then we direct SLD to segregate out the eligible Internet access portion of FRN 366975 and review that portion for funding.³⁷ Essentially, BECPL argues that SLD should have applied a procedure analogous to the 30 percent policy applicable to mixed eligibility requests.³⁸ Under the 30 percent policy, SLD reduces a funding request to exclude the cost of the ineligible services in circumstances where the ineligible services represented less than 30 percent of the total funding request, and treats a funding request as entirely ineligible only if ineligible services constitute 30% or more of the total.³⁹ However, the Common Carrier Bureau has already held that SLD's decision not to segregate Priority One services out of mixed priority requests in a fashion analogous to the 30 percent policy applicable to mixed eligibility requests was a reasonable exercise of its authority to establish procedures for the administration of the schools and libraries support application process in an efficient and effective manner.⁴⁰ We therefore must reject BECPL's request that we direct SLD to segregate out the Priority One portion of FRN 366975 and review that portion for funding.

14. We conclude that, under the applicable review procedure for Funding Year 3, SLD correctly classified all of FRN 366975 as internal connections. Only applicants with a discount rate of 82% or higher were eligible for internal connections discounts in Funding Year 3.⁴¹ BECPL had a discount rate of only 60%.⁴² Because BECPL is not eligible for internal connections discounts in Funding Year 3, we affirm SLD's denial of funding.

³⁷ Request for Review at 9-10.

³⁸ The "30 percent policy" is not a Commission rule, but rather is an SLD operating procedure established pursuant to FCC policy. See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21 and Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058 (1998). This operating procedure, used during SLD's application review process, enables SLD to efficiently process requests for funding for services that are eligible for discounts but that also include some ineligible components. If less than 30 percent of the request is for funding of ineligible services, SLD normally will consider the application and issue a funding commitment for the eligible services. If 30 percent or more of the request is for funding of ineligible services, SLD will deny the funding request in its entirety. The 30 percent policy allows SLD to efficiently process requests for funding that contain only a small amount of ineligible services without expending significant fund resources working with applicants that are requesting funding of ineligible services.

³⁹ See *supra*, n.38.


⁴⁰ *Request for Review by Boone County School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-199596, CC Dockets No. 96-45 and 97-21, Order, DA 01-2770, para. 7 (Com. Car. Bur. rel. November 29, 2001).

⁴¹ Administrator's Decision on Appeal, at 2.

⁴² BECPL FCC Form 471, at 17.

15. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by Buffalo and Erie County Public Library, Buffalo, New York, on March 27, 2001, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Mark G. Seifer
Deputy Chief, Accounting Policy Division
Common Carrier Bureau